Eu Sim Chuan @ Eu Sam Yan & Anor v Kris Angsana Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2(S5)–22–432 OF 1997
AZMEL J
22 OCTOBER 2006

Tort — Negligence — Adjoining properties — Excavation works caused damage to neighbouring land — Failure to take reasonable preventive measures to ensure that no damage to adjacent land — Whether aggravated and/or exemplary damages should be allowed against defendant

The plaintiffs were owners of a double storey bungalow house ('the property'). Sometime in early March 1997, the defendant began to develop the land immediately adjacent to the property to construct two 20–storey condominium blocks. Part of the initial works carried out by the defendant was piling activities for the construction of basement car parks which involved excavation and removal of soil. Such activities had caused movement and settlement of the underground soil which in turn caused damage to the plaintiffs' bungalow house which developed cracks in various parts of the building including the compound of the bungalow. In this action, the plaintiffs alleged that the defendant had been negligent in carrying out the construction works adjacent to their bungalow house. The only issue to be determined was whether there was negligence on the part of the defendant in carrying out the construction work that led to damage caused to the plaintiffs' bungalow.

Held, allowing the plaintiffs' claim:

(1) The factor that one has to bear in mind in doing any construction works in one's land is to ensure safety and security of one's neighbour's property especially the house the neighbour lives in. Reasonable steps and measures must be taken to ensure no damage would cause to one's neighbour's house before commencing any construction works. Failing to take such precautionary measures before commencing such construction works would render one to be actionable for the tort of negligence (see para 15).

(2) In order for the defendant to escape liability for the tort of negligence the defendant must show sufficient evidence that it had taken the necessary steps and measures to ensure no damage was done to the plaintiffs' bungalow located immediately adjacent to the defendant's work site. Having regard to the activities carried out at the site which included piling works and excavating and removing of soil that caused damage to the plaintiffs' bungalow the defendant could not and should be heard to say that it was not liable for the damage to the plaintiffs' bungalow. It is common knowledge that whenever any activities

of sheet piling, excavating and removal of soil are carried out in any area it would cause movement of the water level of the land in the surrounding area. The likely consequence would be that any building constructed on the neighbouring land would develop cracks depending on the degree of the piling, the excavation and removal of soil activities being carried out. A developer like the defendant who employed engineers for carrying out such construction works must be fully aware that the activities it carried out at the work site would likely cause damage to the plaintiffs' bungalow house and should therefore take the necessary steps to prevent damage to the plaintiffs' house (see para 16); *Acton v Blundell* M 84 1152 ER 1223 not followed; *Loh Siew Keng v Seng Huat Construction Pte Ltd* [1998] SGHC 197 followed. In the light of the facts and circumstances, the defendant was liable for negligence for its failure to take any reasonable preventive measures to ensure that no damage would be caused to the plaintiffs' bungalow before commencing its construction works at the adjacent site (see para 19).

(3) Regarding quantum, the following claims were allowed — expert and consultation fees, rental, watchman/guard wages, cost of demolishing and rebuilding of property, cost of moving back into the property and general damages for mental distress, hardship etc. The following items were disallowed — loss in the value of property and theft of items from property on 27 October 1998. The behaviour and attitude of developers towards their neighbours had been so degrading that appropriate authorities should take necessary steps to check their activities to ensure that their neighbours are not adversely affected. In the light of such behaviour and attitude of the defendant towards the plaintiffs, the court would allow the claim for aggravated and/or exemplary damages against the defendant in the sum of RM500,000 (see para 20). The plaintiffs' claim for damages in the sum of RM6,306,242.43 was granted (see para 21).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemilik rumah bungalow dua tingkat ('hartanah tersebut'). Sekitar awal Mac 1997, defendan telah mula membangunkan tanah betul-betul bersebelahan hartanah tersebut untuk membina dua blok kondominium 20 tingkat. Sebahagian daripada kerja permulaan yang dilaksanakan oleh defendan adalah aktiviti cerucuk untuk membina tempat letak kereta tingkat bawah tanah yang melibatkan penggalian dan pemindahan tanah. Aktiviti sedemikian telah mengakibatkan pergerakan bawah tanah yang menyebabkan kerosakan kepada rumah bungalow plaintif-plaintif di mana berlaku retakan-retakan di beberapa bahagian bangunan itu termasuklah kawasan bunglow itu. Dalam tindakan ini, plaintif-plaintif mengatakan bahawa defendan telah cuai dalam menjalankan kerja-kerja pembinaan bersebelahan dengan rumah bungalow mereka. Satu-satunya isu untuk ditentukan adalah sama ada terdapat kecuaian di pihak defendan dalam menjalankan kerja pembinaan yang telah mengakibatkan kerosakan berlaku ke atas bungalow plaintif-plaintif.

Diputuskan, membenarkan tuntutan plaintif-plaintif:

(1) Faktor yang perlu diberi perhatian dalam membuat apa-apa kerja-kerja pembinaan atas sebidang tanah adalah untuk memastikan keselamatan hartanah jiran terutamanya rumah tempat tinggal jiran itu. Langkah-langkah munasabah hendaklah diambil untuk memastikan tiada kerosakan akan berlaku kepada rumah jiran itu sebelum memulakan apa-apa kerja pembinaan. Kegagalan untuk mengambil langkah-langkah berhati-hati sebelum memulakan kerja-kerja pembinaan sedemikian akan mengakibatkan seseorang itu boleh diambil tindakan tort terhadapnya kerana kecuaian (lihat perenggan 15).

(2) Bagi tujuan defendan mengelakkan daripada liabiliti untuk tort kerana kecuaian, defendan hendaklah menunjukkan terdapat keterangan yang mencukupi bahawa ia telah mengambil langkah-langkah yang perlu untuk memastikan tiada kerosakan berlaku kepada bungalow plaintif-plaintif yang terletak betul-betul bersebelahan kawasan kerja defendan. Dengan mengambilkira aktiviti-aktiviti yang dilaksanakan di kawasan itu termasuklah kerja-kerja cerucuk dan penggalian dan pemindahakan tanah yang mengakibatkan kerosakan kepada bungalow plaintif-plaintif. Adalah pengetahuan am bahawa apabila berlakunya apa-apa aktiviti cerucuk, penggalian dan pemindahan tanah di mana-mana kawasan ia akan menyebabkan pergerakan paras air tanah di kawasan sekeliling. Akibat yang mungkin berlaku adalah bahawa apa-apa bangunan yang dibina atas tanah bersebelahan akan berlaku rekahan bergantung kepada tahap aktiviti-aktiviti cerucuk, penggalian dan pemindahan tanah itu dijalankan. Pemaju seperti defendan yang mengambil jurutera untuk menjalankan kerja-kerja pembinaan sedemikian hendaklah sedar bahawa aktiviti-aktiviti yang dijalankan di kawasan pembinaan berkemungkinan besar akan mengakibatkan kerosakan kepada rumah bungalow plaintif-plaintif dan hendaklah oleh itu mengambil langkah-langkah yang patut untuk mengelakkan kerosakan itu berlaku ke atas rumah plaintif-plaintif (lihat perenggan 16); *Acton v Blundell* M 84 1152 ER 1223 tidak diikut; *Loh Siew Keng v Seng Huat Construction Pte Ltd* [1998] SGHC 197 diikut. Berdasarkan fakta dan keadaan berikut, defendan bertanggungjawab untuk kecuaian tersebut kerana kegagalan mengambil apa-apa langkah-langkah pencegahan untuk memastikan bahawa tiada kerosakan akan berlaku kepada bungalow plaintif-plaintif sebelum kerja-kerja pembinaan dimulakan di kawasan bersebelahan tersebut (lihat perenggan 19).

(3) Berhubung kuantum, tuntutan-tuntutan berikut dibenarkan — yuran pakar dan perundingan, sewa, upah pengawal, kos runtuhan dan pembinaan semula hartanah, kos masuk balik ke dalam hartanah itu dan ganti rugi untuk penderitaan mental, kesengsaraan dll. Item-item berikut tidak dibenarkan — kerugian dalam nilai hartanah tersebut dan kecurian barang-barang daripada hartanah tersebut pada 27 Oktober 1998. Tingkah laku dan sikap pemaju-pemaju terhadap jiran mereka adalah buruk sehinggakan pihak berkuasa patut mengambil langkah-langkah sewajarnya untuk mengawasi aktiviti-aktiviti mereka bagi memastikan bahawa jiran mereka tidak terjejas dengan teruk. Berdasarkan tingkah laku dan sikap defendan terhadap plaintif-plaintif, mahkamah membenarkan tuntutan untuk ganti rugi teruk

dan/atau tauladan terhadap defendan berjumlah RM500,000 (lihat perenggan 20). Tuntutan ganti rugi plaintif-plaintif untuk jumlah RM6,306,242.43 adalah dibenarkan (lihat perenggan 21).]

Notes

For cases on adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 655–669.

Cases referred to

Acton v Blundell M 84 1152 ER 1223 (not folld)
Loh Siew Keng v Seng Huat Construction Pte Ltd [1998] SGHC 197 (folld)
Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd & Eugene HL Chan Associates (third party) [1984] 2 MLJ 202; [1984–1985] SLR 381 (refd)

David Lingam (HW Yip with him) (David Lingam & Co) for the plaintiffs.
Dato' BS Sidhu (Sharon Sidhu with him) (BS Sidhu & Co) for the defendant.

Azmel J:

[1] In this case, the plaintiffs, who are husband and wife, are the owners of a property at No 290A, Lorong Palas, Off Jalan Ampang, 50450 Kuala Lumpur on which is constructed a double storey bungalow house ('the said property'). The property is registered in the name of the wife ('the first plaintiff') but the purchase of the said property was wholly financed by the husband, the second plaintiff ('PW1'). Needless to say that the second plaintiff has beneficial interest of the said property. Both husband and wife had been living together in the said bungalow house together with their children until it was damaged by the defendant which led them to bring this action against the defendant.

FACTS OF THE CASE

[2] Sometime in early March 1997, the defendant began to develop the land immediately adjacent to the said property to construct two 20-storey condominium blocks. Part of the initial works carried out by the defendant were piling activities for the construction of basement car parks which involved excavation and removal of soil. Such activities had caused movement and settlement of the underground soil which in turn caused damages to the plaintiffs' bungalow house which developed cracks in various parts of the building including the compound of the said bungalow. What had caused the cracks to the said bungalow house was not seriously disputed. In addition to the evidence of PW1, PW4 and PW5 the cause of cracks to the plaintiffs' bungalow house was also admitted by DW1, an engineer who had inspected the plaintiffs' bungalow house.

[3] There do not appear to be any action taken by the defendant in the form of any precautionary or preventive steps and measures before commencing works on excavation and removal of soil, to ensure that no damage would be caused to the said bungalow house. None of the four witnesses called by the defence gave any evidence

on that issue. Only when cracks had appeared in the plaintiffs' bungalow after the defendant had commenced excavation works that the defendant began to get his workers to inspect the damages to the plaintiffs' bungalow. Yet the defendant continued with its activities and only forced to stop activities for a while on being given stop work order by Dewan Bandaraya Kuala Lumpur. Because the cracks continued to get worse due to the fact that settlement of the underground soil had not fully stabilised the plaintiffs and their family, on the advice of their engineer, vacated the said bungalow house to stay in another house for fear of their safety. On inspection by the plaintiffs' engineer, the bungalow had suffered structural damages particularly the existence of cracks on the floor area, the walls, column and beam.

ISSUE OF NEGLIGENCE

[4] In this action, the plaintiffs alleged that the defendant had been negligent in carrying out the construction works adjacent to their bungalow house. Paragraph 7 of the plaintiffs' statement of claim stated seven acts of negligence of the defendant, namely:

(a) Gagal untuk menjalankan sebarang atau apa-apa penyiasatan tanah yang cukup sebelum memulakan kerja pembinaan termasuk kerja cerucuk;

(b) Gagal untuk mengambil apa-apa langkah yang cukup untuk keselamatan penghuni/hartanah yang bersempadan dengan kawasan pembinaan;

(c) Gagal untuk memberhentikan dan/atau menangguhkan kerja-kerja cerucuk/pembinaan walaupun mempunyai pengetahuan mengenai kerosakan yang ditimpa hartanah tersebut dengan keadaan yang merbahaya kepada jiwa dan keselamatan plaintif serta penghuni-penghuni hartanah tersebut;

(d) Gagal untuk mengamalkan taraf kejuruteraan yang sewajarnya dalam projek pembinaan tersebut;

(e) Gagal untuk memberi sebarang perhatian atau member! perhatian yang secukupnya terhadap amaran-amaran yang diberikan oleh plaintif;

(f) Gagal untuk mementingkan keadaan hartanah tersebut dan penghuni-penghuni yang mendiami rumah-rumah yang bersempadan dengan kawasan projek tersebut;

(g) Menjalankan kerja-kerja cerucuk/pembinaan dengan cara yang tidak professional, tidak munasabuh tanpa jagaan, perhatian dan kemahiran yang sewajarnya dan tidak langsung menghiraukan kepentingan orang lain, khususnya pihak plaintif.

[5] As the cause of the damage to the plaintiffs' bungalow had not been disputed and in fact admitted by the defendant the only issue to be determined is whether there was negligence on the part of the defendant in carrying out the construction work that led to damages caused to the plaintiffs' bungalow. To do this, I need to examine the evidence as regards the actions of the defendant before commencing the construction works. According to the evidence of PW1, the defendant only contacted the plaintiffs to request for permission to install 'ground anchors' into the plaintiffs' property to secure the construction on the site. The action was not for the benefit of the plaintiffs but was in fact done for the benefit of the defendant's activities. Nothing appeared to have been done by the defendant to ensure that the said bungalow house would not be damaged by the activities carried out by the defendant.

As the plaintiffs had alleged that the defendant had been negligent in carrying out the construction activities particularly the excavation and removal of soil from the site it is therefore incumbent upon the defendant to show that it had done all the necessary steps to ensure that the plaintiffs' bungalow at the adjacent property would not be damaged. No evidence had been given by any of the four witnesses called by the defence.

[6] The plaintiffs had called two engineers (PW4 and PW5) to give evidence as regards the cause of the damage to the plaintiffs' bungalow.

[7] Purnam Singh (PW4), a practicing engineer, in his statement said, as regards the most probable causes of the defects to the plaintiffs' bungalow:

> Where buildings, roads or underground services are close to an excavation the effects of these structures of movements due to excavation and the construction of adjacent facilities need to be carefully assessed. The present case of the existing bungalow which is considered close to the ongoing construction of the proposed two blocks of twenty-storey condominium blocks may be analysed keeping in mind the following:
>
> (i) the possible effects of pumping ground water from excavation can cause settlement of the ground surface around the excavation.
>
> (ii) settlement surrounding excavated basements may cause settlement sufficient to cause structural damage to buildings near the excavation and cracking of drains, perimeter fence and other underground services.
>
> In deep basement excavations, supported by sheet piling system settlement may be caused by:
>
> (i) a fall of the original water table level surrounding the excavation due to pumping during construction;
>
> (ii) loss of soil due to erosion and washout of fines;
>
> (iii) possible lateral movements due to elastic deflection of sheeting members, walings and struts or anchors which support the surface.

[8] PW4 went on to state his professional conclusion as to the cause of the damage:

> Based on the monitoring results obtained between the first visual survey of June 1997 and the last survey of December 1997, it can be conclusively established that the damage to the property in question is related to the on-going construction works in the adjacent property. According to interviews with Mr Jagjit Singh and Mr Lim Chooi Kui, (PW3) and PW1 respectively), the first signs of damage to the property concerned were during the piling works in the adjacent property, ie the construction of the two 20-storey condominium blocks.
>
> It is my conclusion therefore that the cause of damage/defect to the property must be due to the ongoing works on the site adjoining the property.

[9] Hence, in the light of the clear cause of action alleged by the plaintiffs against the defendant for negligent acts particulars of which had been enumerated in para 7 of the statement of claim, the defendant should prove to the satisfaction of the court that it had taken all the necessary steps and measures to prevent possible damages to

said bungalow adjacent to the defendant's construction site. No such evidence had been adduced by any of the defence four witnesses.

[10] Nonetheless, the defence counsel submitted that the defendant could not be held liable for the damages caused to the plaintiffs' bungalow. He based his argument on the authority of a 19th century case of *Acton v Blundell* M 8431152 ER 1223. The facts of this case were that the plaintiff sunk a well in his property for raising water for the working of his mill. Subsequently, the defendant sunk two coal pits in his land adjacent to the plaintiffs' property. The result was that the supply of water to the plaintiff's mill was considerably diminished and the plaintiff sued the defendant for interference with his right of enjoyment over the water flowing under his land. It was ruled by the court that a man may abstract water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause injury to him.

[11] This principle was adapted by the Singapore case of *Singapore Finance Ltd v Lim Kah Ngam (Singapore) (Pte) Ltd & Eugene HL Chan Associates (third party)* [1984] 2 MLJ 202; [1984–1985] SLR 381. In this case, the defendants were in the course of erecting a 13-storey building and passed sheet piles surrounding their land. During that period, the owners of building in the neighbourhood complained that cracks appeared on their building.

[12] The defendant contended and admitted that ground de-watering of the plaintiffs' soil had been caused by the defendants excavation works, but the defendant maintained that such de-watering, that is the flow of water from the defendants' soil into the excavation hold through indeterminate or undefined channels, was due to the forces of nature and the forces of gravity and was neither avoidable nor was it due to any positive acts done by the defendant their servants or agents. The defendant contended that the damage to the plaintiffs' building was *damnum sine iniusia* (damage without legal injury). The Court dismissed the plaintiffs' claim.

[13] However, there was a subsequent case in Singapore which ruled the principle of *Acton v Blundell* to be no good law to be applied to modern Singapore and therefore should not be followed. It is the case of *Loh Siew Keng v Seng Huat Construction Pte Ltd* [1998] SGHC 197. In this case, the defendant carried out certain sewerage works which included replacement of an underground sewer line adjacent to the plaintiffs' house. The plaintiff brought an action for negligence and nuisance arising from the defendant's excavation of the trench next to the plaintiffs' house as cracks penetrated the walls on the first and second floor of the plaintiffs' house as well as a continuous crack line on the external floor and at other parts of the house.

[14] In his judgment, Chan Seng Onn JC gave his view on the ruling of *Acton v Blundell*:

> The result then is that I have to consider whether the Singapore Courts should adapt the rule in *Acton v Blundell* as a matter of choice. On careful consideration, I came to the

A conclusion that it should not be the law of Singapore. With respect I found myself unable to agree with Lai Js decision on this point. In *Acton v Blundell*, the plaintiff complained of being cut-off from the water caused by the defendant's action; it was not a claim of physical damage to his land caused by loss of support.

B I do not think that the rule in *Acton v Blundell* can be justified today. It may be that in old England, the courts had to take into account the rights of the landowners to extend water percolating underground for drinking purposes and farmland irrigation. Even if soil subsidence of adjacent land resulted, I do not think the damage, if any, would be significant. I think that the rule is clearly ill adopted to conditions in Singapore, where many areas are densely built up, with adjacent building very close to, if not adjoining each other, and where there is hardly anymore open land farming activities being carried out. Drinking water is no C longer drawn from wells sunk into the ground. Water is supplied by an extensive system of water pipes to distribute water to all who need it I am not inclined to follow *Acton v Blundell* because there is insufficient consideration given to the rights of adjacent landowners. One has to balance the rights of the landowner to support and the proprietary right to exploit one's land, eg the right to pump water.

D To conclude that those who abstract percolating water have an unbridled licence to wreak havoc on their neighbours would be harsh and entirely out of keeping with the law of torts as it exist today.

[15] I am in full agreement with the views expressed by Chan Seng Onn JC in the Singapore case of *Loh Sim Keng*. The drastic change in the living style of people since E ancient England in the 19th century to those in the 21st century would require a change in the application of the law. Principles of law that are archaic as the one propounded in *Acton v Blundell* should no longer be applied to modern society like Kuala Lumpur where, like Singapore, buildings are very close to each other. And, as observed by Chan JC, drinking water are no longer obtained from wells. The modern F society are supplied with pipe water to their houses. Hence, the factor that one has to bear in mind in doing any construction works in one's land is to ensure safety and security of one's neighbour's property especially the house the neighbour lives in. Reasonable steps and measures must be taken to ensure no damage would cause to one's neighbour's house before commencing any construction works. Failing to take such precautionary measures before commencing such construction works would G render one to be actionable for the tort of negligence.

[16] In the instant case, in order for the defendant to escape liability for the tort of negligence, the defendant must show sufficient evidence that it had taken the necessary steps and measures to ensure no damages were done to the plaintiffs' H bungalow located immediately adjacent to the defendant's work site. Having regard to the activities carried out at the site which included piling works and excavating and removing of soil that caused damages to the plaintiffs' bungalow, the defendant could not and should be heard to say that it is not liable for the damage to the plaintiffs' bungalow. It is a common knowledge that whenever any activities of sheet piling, I excavating and removal of soil are carried out in any area it would cause movement of the water level of the land in the surrounding area. The likely consequence would be that any building constructed on the neighbouring land would develop cracks depending on the degree of the piling, the excavation and removal of soil activities being carried out. A developer like the defendant who employs engineers for carrying out such construction works must be fully aware that the activities it carried out at

the work site would likely cause damages to the plaintiffs' bungalow house and should therefore take the necessary steps to prevent damages to the plaintiffs' house.

[17] But the defendant in the instant case chose not to take any such preventive measures before commencing the construction works of sheet piling, excavation and removal of soil. There it is of no surprise that the defendant's activities had caused major damages to the plaintiffs' bungalow.

[18] The damages to the plaintiffs' bungalow that had been caused by the activities are so severe that on the advice of the plaintiffs' engineers it was no longer safe for the plaintiffs to continue to stay in the house. Not only major and minor cracks to the building had developed the electrical system had also failed and the water supply had also been adversely affected due to the damages to the walls where the electrical and water systems were hidden. It was my finding that the bungalow was no longer safe for habitation. The plaintiffs were quite right in deciding to vacate the house for fear of their safety and convenience.

[19] In the light of the facts and circumstances as I have mentioned above, I found the defendant liable for negligence for its failure to take any reasonable preventive measures to ensure that no damages would be caused to the plaintiffs' bungalow before commencing its construction works at the adjacent site.

ISSUE OF QUANTUM

[20] After having ruled that the defendant was liable for negligence, I proceeded to hear witnesses from both parties as regards the issue of quantum of damages payable by the defendant to the plaintiff. The plaintiff called five witnesses some of whom had given evidence earlier when the case proceeded on determining the issue of liability. The defendant called three witnesses. I also asked counsels for both parties to give their written submissions. Based on the evidence adduced and submissions of both counsels before me, I arrived at the decision on quantum on the various items claimed by the plaintiff as follows:

(1) Expert and Consultation Fees

> I find the plaintiffs' claim under this Item is legitimate. And the amount claimed is reasonable. However, the total fees of the engineers, the valuers and the quantity surveyors should be RM43,828.85 instead of RM44,828.85.

(2) Rental

> The plaintiffs' claim for rental at the premises No 1B, Gerbang Ampang Hilir, 55000 Kuala Lumpur and No 7, Taman U Thant Dua, 55000 Kuala Lumpur is legitimate. It is also legitimate for the plaintiffs to claim rental charges while staying at No 1B, Gerbang Ampang Hilir even though the property was subsequently purchased by the plaintiffs' family company. The plaintiffs are only claiming the rental and not the purchase price of the property. The rental of RM12,000 per month is fair and reasonable, taking into consideration that the rental of the same premises before purchased by the plaintiffs was RM14,000 per month. In addition, the said premises

had been renovated by the plaintiffs which would give an added value to it. The total claim for rental allowed is RM1,230,246.58.

(3) Watchman/Guard Wages

The claim under this item is legitimate. It is only fair for the plaintiffs to employ a watchman of the damaged and unoccupied premises since the plaintiffs and their family were not staying there, so as to avoid any vandalism or theft to it. The amount claimed is reasonable. I allow the claim of RM88,000 under this item.

(4) Cost of Demolishing and Rebuilding of Property

I agree that based on the facts and circumstances of this case it would not be safe to continue to stay in the said property. Doing repair works to the existing building may not be feasible under the circumstances. I agree with the opinion of plaintiffs' expert witness that it would cause the plaintiffs much more if repair works are done instead of demolishing and rebuilding it. The nature of the soil would require drastic foundation works to be carried out with proper reinforcement. The amount of claim for demolition and rebuilding is in my view fair and reasonable. I therefore allow the claim for RM3,393,167 under this item.

(5) Cost of moving back into the Property

This item is indisputable and the amount claimed is also reasonable. I therefore allow the claim of RM50,000 under this item.

(6) Loss in the Value of Property

I am inclined to disallow this claim for loss in value of the property. The subject property has not been sold. Hence, the actual loss has not been realised. As I have allowed the claim for rebuilding the property it would not be legitimate to claim for any loss in the value of the property.

(7) Theft of Items from Property on 27 October 1998

I am also not in favour of allowing this item. At the time of theft, the premises was being guarded by the watchman. He did not see the people entering the premises. It must be due to his negligence that the Items were stolen.

(8) General Damages for mental distress, hardship etc

There are ample evidence that the damage to the property had caused severe mental distress and hardship to the plaintiffs thereby resulting in the health conditions of the second plaintiff to deteriorate drastically. The whole members of the plaintiffs' family had faced great hardship, getting transferred from one house to another. The first plaintiff, who had personally supervised the construction of the house, must be feeling very painful and sad to see the house being damaged due to the activities carried out by the defendant. I allow the claim of RM1,000,000 under this Item.

(9) Aggravated and/or Exemplary damages against the defendant for their conduct in the matter

On the facts of this case, it is quite obvious that the cause of damage to the plaintiffs' property was due to the excavation works carried out by the defendant at the site

adjacent to the plaintiffs' bungalow. And the damage began to appear during the excavation works carried out by the defendant. The matter could have been easily settled if at that time the defendant were to admit liability and agree to do the necessary repair and ratification works as well as necessary preventive measures. The defendant refused to admit that they were liable for its action. Instead, the defendant preferred to wait for the plaintiffs to bring court action knowing that this would take years to complete. The longer the delay the more advantageous would it be to the defendant. As for the plaintiffs, the longer the delay the more painful would be their sufferings. This is how the defendant in this case actually behaved. In addition to that having considered the proximity of the plaintiffs' property to the excavation site, adequate tests and precautionary measures should have been taken by the defendant to ensure that the foundation of the plaintiffs' property would not be affected by their excavation activities. The defendant should have determined the type of foundation on which the plaintiffs house was constructed vis-a-vis the nature of the soil found there, and then to take appropriate steps to ensure that the plaintiffs' property would not be damaged. No such tests or any preventive measures were carried out by the defendant on the plaintiffs property. Any reasonable person, more so a developer of the defendant's standing, would have foreseen the consequence of the excavation works on the plaintiffs' property. This clearly indicates the could not care less attitude of the defendant which is most uncalled for. The sole concern of the defendant was to quickly complete the construction and reap as much benefit with the minimum amount of costs incurred. It is a very selfish attitude most undesirable in a community we Malaysians are used to. The behaviour and attitude of developers towards their neighbours have been so degrading that appropriate authorities should take necessary steps to check their activities to ensure that their neighbours are not adversely affected. In the light of such behaviour and attitude of the defendant towards the plaintiffs, I allow the claim for aggravated and/or exemplary damages against the defendant in the sum of RM500,000.

[21] I thereby allowed the plaintiffs' claim for damages in the sum of RM6,306,242.43. I award interest at the rate of 8% pa on the amount awarded from the date of filing of this suit to the date of realisation. I order that the costs of this action be paid by the defendant to the plaintiffs.

Plaintiffs' claim allowed.

Reported by Loo Lai Mee